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ABSTRACT

The "Fairness Doctrine" amendment to the 1934 Communications Act has had a negative impact on radio and television broadcasting in the United States. While the amendment was intended to prevent the nation's airwaves from monopolization by individuals or groups with specific interests or viewpoints, it has, in fact, restrained freedom of expression. In so doing, the American public is being denied its First Amendment right to freedom of speech. The most compelling arguments in favor of granting the full protection of the First Amendment to radio and television licensees are set forth in the dissenting opinion of Chief Judge David Bazelon in "Brandywine-Mainline Radio v. Federal Communications Commission". Numerous examples of the inhibiting effects of the Fairness Doctrine can be cited, including executive level suppression of bold or controversial programing. The Fairness Doctrine has been justified on the basis of the limited number of frequencies available for assignment to licensees. However, there are currently 7,458 broadcasting stations in contrast to 1,749 daily newspapers. Most Americans now consider television and radio to be their most important news source. There is no factual basis for continuing to distinguish the printed word from the electronic press as the true news media. Television should, therefore, be emancipated from the Fairness Doctrine. (DC)

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CHECK ONE:

☐ People who disagree with opinions on public issues that are expressed on the air must be given equal time for dissent. *This is their inalienable First Amendment right.*

☐ Station owners and network officials must be allowed to decide who can voice ideas over the airwaves – and who can not. *This is their inalienable First Amendment right.*

HOW "FAIR" SHOULD TV BE?

BY NAT HENTOFF

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I fail to see how constitutionally we can treat TV and the radio differently than we treat newspapers....The Fairness Doctrine has no place in our First Amendment regime. It puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or its benevolent ends.

Justice William O. Douglas
Columbia Broadcasting System v. Democratic National Committee

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LAST FEBRUARY, ABC-TV refused to televise an already-taped Dick Cavett show with guests Abbie Hoffman, Jerry Rubin, Tom Hayden and Rennie Davis. In response to queries from newspaper reporters, ABC's management explained that the network "had an obligation to insure fairness and balance under requirements of the Federal Communications Commission." And Cavett's four guests, ABC management continued, "made controversial remarks about the U.S. judicial system, continuing hostilities in Southeast Asia, Watergate scandals and the use of revolutionary tactics.

The offending program would be aired, ABC said, only if Cavett sliced a half-hour out of it and, in accordance with what's known as the Fairness Doctrine, used that time to interview one or more people who are manifestly conservative in their views.

Cavett at first refused, then succumbed reluctantly after the network canceled the original show. When it was finally aired on March 21, it not only had been altered slightly, but for rebuttal purposes two right-wingers – Jeffrey St. John, a CBS political commentator, and Fran Griffin, Illinois chairwoman of Young Americans for Freedom – had been tacked on.

The Fairness Doctrine became law in 1959, when Congress amended the 1934 Communications Act to insist on the obligation of broadcast licensees "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." The air, after all, is public; and the public should have access to broadcasting facilities using its air.

Television- and radio-station owners, and not a few news reporters and analysts in broadcasting, objected. Nobody, they reasoned, certainly not the government, can force a newspaper or magazine or book publisher to give space to those who consider a particular article or book "unfair." So why shouldn't television and radio, like the print media, have the same inalienable First Amendment rights to voice views freely?

In 1969, the Supreme Court appeared to have answered that question for some time to come. In its *Red Lion* decision, the Court proclaimed that "a licensee has no constitutional right...to monopolize a radio frequency of his fellow citizens." Furthermore, the Court emphasized, "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market...[by] a private licensee."

ALMOST EVERYBODY APPROVED

The *Red Lion* decision caused general rejoicing among liberals, most centrists and even a sizable number of conservatives who, while usually of the view that private enterprise and government regulation are antithetical, decided that in the matter of the public airwaves, only the government can effectively mandate that there be a real public forum for clashing ideas. (Many conservatives, after all, hold it as an article of faith that broadcasting is dominated by "left-leaning" reporters and analysts, and the *Red Lion* decision gave promise of some "balance" on the people's air.)

As a civil libertarian, I too was among the rejoicers. One of my own articles of faith has long been that owning a radio station, and especially a television station, amounts to having a license to make a hell of a lot of money. The least that broadcasting ownership can do

Investigative reporter Nat Hentoff thrives on controversial issues, as evidenced by the subject of his latest book, coauthored with Paul Cowan and Nick Egleson entitled State Secrets: Police Surveillance in America. (Holt, Rinehart & Winston, 1974). Mr. Hentoff is a columnist for the Village Voice and is on the faculty of the Graduate School of Education, New York University, and The New School for Social Research (New York).

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to justify all those profits is to give dissenting citizens free and fair access to their channels.

My "heresy," with regard to the Fairness Doctrine, began to take shape in November 1972, when I read a dissenting decision by David Bazelon, Chief Judge of the United States Court of Appeals for the District of Columbia Circuit. Bazelon, who warred frequently with Warren Burger when the latter was on that appeals court, is a pre-eminent civil libertarian. He is also one of the few judges in the country who, like William O. Douglas, writes with marvelous and witty lucidity. We all have our prejudices, and one of mine has been best summarized by J. Mitchell Morse in *The Irrelevant English Teacher* (Temple University Press, 1972): "Style is a matter of intellectual self-respect. To write well, a certain moral courage is essential."

I would pay more attention, for instance, to William Buckley if he were finally to recognize that ormolu rococo reveals a talent for self-inflation but has little to do with writing or thinking well.

It was not, however, on aesthetic grounds that Judge Bazelon's decision in *Brandywine-Main Line Radio, Inc. v. Federal Communications Commission* shook me up. What Bazelon was saying made unnerving sense – both common sense and constitutional sense.

The case at issue concerned the FCC's refusal to renew the license of radio station WXUR in Media, Pa. The station was under the control of Rev. Carl McIntire, a fustian preacher whose views are well to the right of those of, let us say, Barry Goldwater and Savonarola. The FCC claimed that WXUR had failed to adhere to the Fairness Doctrine, pointing out that in decapitating WXUR, it was only doing what the Supreme Court, in the *Red Lion* decision, had mandated it to do.

Bazelon's dissent is worth close attention because it gets to the core of a rather complicated question. The First Amendment is designed to allow the citizenry as wide and robust a range of views as partisans can come up with. Accordingly, the Fairness Doctrine would appear to be eminently in line with the First Amendment. The people's right to hear diversity of opinion, and to express their own opinions, must surely have primacy over the First Amendment rights of those who own radio and television stations and of those who are regular staff reporters and commentators.

THE RIGHT TO BE DISRUPTIVE

It is not, however, all that simple. First of all, Bazelon noted, the FCC, by forcing WXUR off the air, had deprived its listeners of *that* station's ideas, "however unpopular or disruptive we might judge these ideas to be." (Or, as Justice Douglas has pointed out, "Under our Bill of Rights, people are entitled to have extreme ideas, silly ideas, partisan ideas.")

Hold on, though. Let's grant that those who determine policy for a station do have the right to express even such noisome ideas as those of Rev. McIntire. What, then, can be wrong with forcing such ownership at least to share its channel with those who oppose its ideas?

Bazelon answers by observing that it is very difficult for a station such as WXUR to be held firmly and continually to the Fairness Doctrine, since "the monitoring procedures which the FCC requires for identification of controversial issues are beyond the capacity of a small staff, or a shoestring operation." This burden of equal time, he added, involves "...very critical First Amendment issues indeed. The ratio of 'reply time' required for every issue discussed would have forced WXUR [if the FCC had allowed it to continue, in strict conformity to the Fairness Doctrine] to censor its views – to decrease the number of issues it discussed or to decrease the intensity of its presentation. The ramifications of this chilling effect will be felt by every broadcaster who simply has a lot to say."

A specific example which Judge Bazelon might have cited has to do with a complaint filed with the FCC in 1971 against KREM-TV in Spokane, Wash. The viewer invoking the Fairness Doctrine was Sherwyn M. Hecht, who was irritated by the unfairness, as he saw it, of KREM-TV's failure to provide sufficient air time to those citizens of Spokane opposing a local bond issue to raise money for a projected "Expo '74" undertaking.

Ultimately, on May 17, 1973, the FCC decided that Mr. Hecht's complaint was unwarranted. In the meantime, however, the station had to spend some 480 work-hours of executive and supervisory time satisfying the FCC that it had indeed been fair on that issue. This did not include supporting secretarial or clerical time. As a station official said rather wearily, "This represents a very serious dislocation of regular operational functions and is far more important in that sense than in terms simply of the dollar value of the salaries of those engaged in our self-defense."

That's too bad, an advocate of the Fairness Doctrine would say, but this kind of expense and dislocation is a necessary part of the cost of being a responsible – and responsive – broadcaster. If there is indeed a danger that some small stations might go under because of this financial weight, it could be possible for non-competing stations (stations in different cities) to share expenses in hiring a full-time team of people expert at responding to FCC inquiries.

DIG WE MUST

In any case, this economic argument against the Fairness Doctrine surely can't apply to metropolitan stations or to the networks. However, Richard Salant, head of CBS News, disagrees. In an interview with writer Fred Powledge for the latter's American Civil Liberties Union report, *The Engineering of Restraint: The Nixon Administration and the Press*, Salant spoke of network economic and dislocation problems inexorably linked to the Fairness Doctrine, no matter which administration is in power: "We get a letter [from the

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FCC, notifying the network of a complaint from the public] and everybody has to dig. The reporters, the producers of the show, everybody has to dig out stuff and try to reconstruct why they did what they did...If nothing else, it takes you away from your work. And when it is the government, through the FCC, moving into areas of program content, the effect is *chilling*. We have more lawyers than we have reporters."

It is when broadcasters, including reporters, argue against the Fairness Doctrine on the ground of its "chilling" effect that we move from matters of economics and personnel disarrangement to a fundamental First Amendment question. As Judge Bazelon emphasized in his dissenting opinion on the FCC's expunging of WXUR, "In the context of broadcasting today, our democratic reliance on a truly informed American public is threatened if the overall effect of the Fairness Doctrine is the very censorship of controversy which it was promulgated to overcome."

Is there evidence of a chilling effect because of the Fairness Doctrine?

Louis Seltzer, president of WCOJ, a 5,000-watt radio station in West Chester, Pa., wrote the American Civil Liberties Union last year in an attempt to persuade it to stop supporting the Doctrine. "The Fairness Doctrine," Seltzer argued, "is *unfair*. As a practical matter, I know that it has served to muzzle this station for 25 years. An example: We aired only one or two [shows] of a well-produced series put out by the Anti-Defamation League of the B'Nai B'Rith on 'the Radical Right.' Why? Simply because airing these programs would open the floodgates to a paranoid response from the 'nut' groups ...True, we could refuse to run the reply programs on the basis of their patent untruth, but this would cost us a $10,000 lawsuit up to the Supreme Court of the United States, and even then there would be a possibility of losing...This station is not small, but it is not that large. We have neither the time nor the money to devote to such Joan-of-Arcian causes."

One obvious response to Mr. Seltzer's words is that the First Amendment exists for the benefit of "nut" groups too, but the point is that he did decide not to run the full series rather than get embroiled in a lawsuit.

A CHILLING BALANCE

Another illustration of the Fairness Doctrine's negative effect was that Cavett show decision. Richard Salant, who on the basis of his doughtily independent record would not, I think, have censored that program, has observed in answer to another request for the kind of "balance" that ABC-TV asked of Cavett: "Suppose the English governor had told Tom Paine that he could go ahead and publish all he liked, but at the back of his pamphlets he would have to allow the governor's assistant to publish *his* views to guarantee that the pamphlet had given the other side. That would have preserved Tom's right of free speech, but far from being an implementation of the First Amendment, it would have been just the opposite. You would have to consider it a restriction upon speech if, in order to print a broadside, Tom Paine had to present not only his own views but also those of someone arguing on the other side."

During the same week in which ABC-TV, in fear of the Fairness Doctrine, exercised prior restraint on Dick Cavett and his four controversial guests, a number of radio stations throughout the country refused to broadcast a new recording by the singing team of Seals & Crofts. The song, *Unborn Child*, argued against abortion. The station executives who censored the song from the public air explained that they did not want the hassle of providing equal time to pro-abortion spokespeople.

A recurring point made by Salant is that the *publicized* examples of station and network self-censorship are only a small percentage of such management decisions which no one ever gets to hear about. "When one's very survival in one's business—broadcasting—depends on licensing by the government; when the penalty for error and for government disagreement is not a fine, but capital punishment [the loss of your operating license], does anybody think for a moment that there are not those who have said, 'Let's skip this one, let's not make waves, let's stay out of trouble'?"

Even in his own organization, Salant, who is more supportive of his investigative reporters than any other network news chief, has "a constant fear that somebody down the line—reporters or producers or somebody—will think 'Gee, we've caused such headaches to management, or to ourselves, in having to dig out all this stuff, when the lawyers come around, I'll play it easy for a while.'" Salant even sent a memorandum to his news staff telling them he considered self-censorship a "high crime."

Salant may not know it, but the memorandum didn't work in all cases. An official at WCBS-TV in New York has said—not for attribution, of course—"Sure, there are enough pressures in this business; who needs trouble from the FCC?"

A classic case of FCC interference with a network news operation began with a complaint by a small but vigorous organization called Accuracy in Media (AIM), accusing NBC-TV of not being fair in its 1972 documentary, *Pensions: The Broken Promise*. AIM told the Federal Communications Commission that the program had been unbalanced, focusing on the deficiencies of private pension plans and not providing equal time to those pension plans that actually do protect the retired worker. The FCC agreed, and in May 1973, wrote NBC: "It does not appear that you have complied with your Fairness Doctrine obligation" to give both sides of controversial issues.

HOW TO BEAT THE BLAND

NBC is appealing that decision, maintaining that if the FCC ruling stands, investigative reporting on tele-

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vision will be markedly curbed. Attorneys for the network have emphasized that "to the extent the FCC staff's opinion requires ever greater accountability to the government itself, it is simply inconsistent with the long history of disassociation and even antagonism that has characterized the relationship between government and press in our country." Television journalists, NBC went on, would be forced "to engage in a kind of thinking and practice which has nothing to do with journalism. It would impose, as well, a variety of other less-obvious sanctions—the inhibiting effect upon television journalists and producers of being obliged to justify to their superiors and to the Commission the work they have done; the immense amount of time required—time better spent in preparing new programming—in preparing a 'defense' to similar charges; the ever-present threat to license renewals inherent in such rulings; and the like. In short, the issue is not alone whether television journalism will be too bland; it is whether it will be free enough not to be bland."

Ironically, in a footnote to its decision affirming the complaint against NBC by Accuracy in Media, the FCC staff had accurately observed that "for years prior to the broadcast of *Pensions*, neither NBC nor the other networks, to the best of our knowledge, had telecast any program dealing extensively with private pensions. There was little discussion in any general circulation print media and [there were] no widely distributed books on the subject. In fact, there was no apparent public discussion, much less controversy, apart from that of a relatively small number of experts, businessmen and government officials who take a professional interest in the subject. There had been hearings in the last Congress on the subject, but NBC was breaking new ground journalistically on a subject about which the public, at that time, had little knowledge."

So, by way of encouraging new groundbreaking by television journalists, the FCC thereupon demanded that NBC give time to "the other side."

Meanwhile, Abraham Kalish, Executive Secretary of Accuracy in Media, wrote a letter to stations affiliated with NBC, reminding them: "If you carried *Pensions: The Broken Promise* and you have not given your audience a program that showed the other side of the issues, you have not fulfilled your obligation under the Fairness Doctrine. I am sure that you are anxious to fulfill that obligation. NBC may wish...regrettably...to challenge the FCC on the Fairness Doctrine issue, but it is the licensee, not the network, that *may have this used against him in any challenge to a license renewal.* NBC has an obligation not to play games with your license. We urge you to tell NBC that." [Emphasis added.]

ANTEDILUVIAN ENTREPRENEURS

The message was well-aimed. As a network correspondent—again, not for attribution—notes, "All along the line there are individual owners of affiliated stations who are antediluvian, moneymaking, conservative-thinking entrepreneurs. The network sends them something like CBS's *The Selling of the Pentagon* or NBC's *Pensions: The Broken Promise*, and they get very, very worried."

Richard Salant, for attribution, puts it even more starkly: "The affiliates have the perfect right under the law to turn down everything from the network that they don't want. They can put those of us in news completely out of business by turning the faucet. The government knows it can scare the pants off almost any broadcaster—certainly the affiliates. It takes an awful lot of guts for management to ignore these attacks because they can literally mean station owners will lose their economic life."

In one of the affidavits included in NBC's petition with the Court of Appeals for the District of Columbia, in its attempt to have the FCC decision on *Pensions* overturned, the network points out that this particular program won the prestigious George Peabody Award for public service in television as "a shining example of constructive and superlative investigative reporting." Furthermore, in March 1973, *Pensions* received a Christopher Award for "television news calling public attention to a much-neglected social issue." In May of that year, there was also a National Headliner Award for the program, followed in June 1973 by a Certificate of Merit of the American Bar Association.

Nonetheless NBC—unlike, let us say, THE NEW YORK TIMES if it had printed a similar report on pensions—has to defend itself against the government. Reuven Frank, an NBC News executive with a remarkable track record for investigative journalism on television, says mordantly that the FCC's decision means that "we in television news must never examine a problem in American life without first ascertaining that we have piled up enough points on the other side—a little bank account of happiness to squander on an area of public concern. Otherwise, we should be overdrawn, and would have to schedule a program in payment of the debt.

"Must I and others charged with the responsibility for documentary programs," Frank continues, "review each proposed subject to see not only if it needs doing and can be done but whether we are *entitled* to do it? Must a search be made each time of the entire history of the network and its programs to determine whether enough has been presented saying there is no problem, so that we can be licensed to do a program saying there is a wee problem after all? Anyone I could hire for this would not be worth having. On the other hand, it will be a boon for travelogues."

David Brinkley adds: "To be found guilty of 'unfairness' for not expressing to the government's satisfaction that most people are not corrupt or that most pensioners are not unhappy is to be judged by standards which simply have nothing to do with journalism."

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A WET BLANKET ON BOLDNESS

And Bill Monroe, Washington editor of the NBC News' *Today* program, articulates the anxieties of many news broadcasters on other networks and independent stations: "The very knowledge that the obstacle course seen in the *Pensions* ruling exists has an inevitable wet-blanket effect on reporters and producers. The FCC, while speaking for boldness, turns around and punishes those who practice it. It is thoroughly understood in the industry that the most likely outcome of bold journalism is trouble with the FCC: a penalty, amounting to harassment, in the form of an official request for justification, in 10 or 20 days after a program has been aired, that the program is in compliance with the Fairness Doctrine. Any newsman who has seen the effort a broadcast executive and his staff must make to prepare an answer to such an official request can only assume that his boss, as a human being, would have a desire to minimize such official challenges in the future."

Joining in NBC's petition to the Federal District Court was J. Edward Murray, associate editor of the Detroit FREE PRESS and a past president of the American Society of Newspaper Editors. By way of example of how inhibiting a fairness doctrine applied to print media would be, Murray says: "Newspapers, including the Detroit FREE PRESS, investigate and expose policemen who are on the 'take' in the dope rackets. If an equivalent weight or time must be given to policemen who are not on the 'take,' the whole campaign becomes so unwieldy and pointless as to be useless. Must the good cops get equivalent space with the bad cops?"

As of this writing, NBC's case for First Amendment rights for its news staff is still in the courts. "Even if we win," an NBC reporter observes, "you can be sure that the next time someone comes up with an idea for a tough exposé, the brass is going to think quite awhile before it gives us the go-ahead, and then they'll probably impose their own 'fairness doctrine' on us."

Whatever the courts do decide, those who fervently support the Fairness Doctrine continue to argue that broadcast and print journalism cannot be equated because anyone can start a newspaper but radio and television channels are limited. Therefore, there *has* to be government supervision of "fairness." This is a venerable contention, but it no longer is germane to the real world of communications. In his dissenting opinion in the WXUR case, Judge David Bazelon pointed out that as of September 1972, the number of commercial broadcasting stations on the air was 7,458. By contrast, as of Jan. 1, 1971, there were only 1,749 daily newspapers in the country.

"Nearly every American city," Judge Bazelon wrote, "receives a number of different television and radio signals. Radio licenses represent diverse ownership; UHF, local and public broadcasting offer contrast to the three competing networks; neither broadcasting spectrum is completely filled. But out of 1,400 newspaper cities, there are only 15 left with face-to-face competition."

THE CABLE REVOLUTION

Starting a new daily paper now requires an enormous amount of money and an extraordinary leap into faith. "Who at this time," Justice Douglas asks, "would have the folly to think he could combat THE NEW YORK TIMES or Denver POST by building a new plant and becoming a competitor?" The prospect, in fact, is for fewer rather than more daily newspapers in the years ahead. On the other hand, the already markedly larger number of television choices available to the citizenry is going to increase significantly. "It is predicted," Bazelon observed, "that in perhaps 10 years it will be possible to provide to the television viewer 400 channels; that by 1980 half the nation will be on cable television; and that a host of educational and public services will accompany the cable revolution which are simply mind-boggling. Thus, even now we possess the know-how necessary to do away with technical scarcity through CATV [cable television] ...Is it not a little ironic that we still adhere to our fears of monopoly and limited access? Ought we not instead focus our attention on how we can make the cable medium economically accessible to those who assert a right to use it?"

I would add that those undeniably well-intentioned groups now striving to expand the Fairness Doctrine—thereby unwittingly "chilling" the potential for more controversial broadcast journalism—might better expend their energies in trying to implement the American Civil Liberties Union's conviction that "cable television should be operated on a common-carrier basis. This means channels of the cable service should be open to anyone willing to lease them, just as the telephone lines are open to anyone willing to pay to make a telephone call."

Testifying before the FCC in 1971, Irwin Karp, a member of the ACLU's Communications Media Committee and also attorney for the Authors League and the Authors Guild, stated: "The ACLU believes that the adoption of a common-carrier policy is essential because it will provide a system of communication that fulfills the needs of the First Amendment, avoiding public and private restraints on freedom of expression; and assuring full access to a meaningful marketplace of ideas. The ACLU also believes that a common-carrier approach will provide the greatest diversity of programming and the most efficient service of which the medium is capable."

Keeping in mind the number of channels which can be made available through cable television, there is the further point that—as a recent Rand Corporation study, *New Television Networks*, demonstrates—right now it is possible to "drop in" at least 67 major TV stations in the country's 100 largest urban centers. These are stations that could be seen even if you don't

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have cable television. It is not at all fanciful, in sum, that in a decade or so, TV GUIDE will, as a television researcher says, be "as fat as a telephone directory."

THE ROLE GOVERNMENT SHOULD PLAY

The scarcity argument – that Federal officials have to insure "fairness" in television because there are so few channels – is no longer tenable. Does the government, then, have any legitimate function in television? Sure, says Justice William O. Douglas. It has a duty with regard to television – as it has concerning the printed media – to prevent monopolistic practices. That it has largely failed in this responsibility in relation to newspapers (most recently, through the Newspaper Preservation Act, which gives them limited but substantial exemption from antitrust laws) does not mean that the government ought to abdicate this duty concerning television. If, for example, one group of station owners is a predominant force in a particular region, that ownership should be divested of some of its telecasting facilities.

Federal authorities are also, Justice Douglas notes, responsible for "promoting technological developments that will open up new channels. But censorship or editing or the screening by government of what licensees may broadcast goes against the grain of the First Amendment."

Another necessary function of government is to make sure that channels don't intersect. Seeing to it that Channel 2 in any given city doesn't cut into Channel 4's picture has nothing to do with the First Amendment. In this respect, the government's role is like that of a traffic cop keeping motorists in their proper lanes.

There is also nothing destructive of the First Amendment in the current efforts of various groups to see that fair-hiring practices – including equality of access to broadcasting jobs by minorities and by women – are adhered to by television stations. That kind of pressure is also being applied to newspapers, and it is entirely constitutional.

My thesis – that those who would also have the government intervene in programming to assure "fairness" are wrong headed – has another dimension. Emboldened by these forays into broadcasters' First Amendment rights, people who decry the "unfairness" of newspapers are pressing for "access" to print media.

On Feb. 4, 1974, Senator John McClellan of Arkansas suggested that Congress consider mandating that newspapers publish the replies of public figures who are attacked. Let the head of *that* camel get into the tents of newspapers and magazines, and those editors who are already timid – and they are not few – will make sure that their reporters stick to "safe" stories, like "color" features attendant on the annual Indianapolis Speedway race. In 1972, David Burnham of THE NEW YORK TIMES wrote a long, devastating article on police corruption in New York City – a piece that forced an extremely reluctant Mayor John V. Lindsay to establish the independent Knapp Commission to dig into the subject of cops on the "take." Would that story have had nearly as much impact if the TIMES had been compelled to give equal space and position to a story quoting the Police Commissioner about how many honest cops there were on the force? Furthermore, that kind of requirement might well persuade a less independent newspaper than the TIMES not to publish a story on police corruption in the first place.

FLORIDA'S "RIGHT TO REPLY" LAW

There is, in fact, a state law – in Florida – that *does* require newspapers to print the replies of political candidates to critical editorials. In the fall of 1972, when Pat L. Tornillo was a candidate in the Democratic primary for the Florida House of Representatives, The Miami HERALD referred to Tornillo in an editorial as a "czar" and a lawbreaker who engaged in "illegal acts against the public trust." A few days later, the newspaper published another editorial which also considerably annoyed Mr. Tornillo.

The alleged "czar" asked the newspaper to print his rebuttal – verbatim and free, as the Florida statute permits. The HERALD refused; a lawsuit followed; and the Florida Supreme Court, reversing a lower court decision, held, in a highly disturbing 6-1 ruling, that the state "law of reply" is indeed constitutional.

In a brief that asked the United States Supreme Court to reverse the ruling of the Florida Supreme Court, the American Civil Liberties Union reminded the nine Justices of a previous statement by one of them, Potter Stewart, that the Constitution clearly commands "that Government must never be allowed to lay its heavy editorial hand on any newspaper in this country."

Should the Supreme Court uphold the Florida "right of reply" statute, Sen. McClellan will surely be joined by other legislators in concocting all sorts of "fairness doctrines" to be invoked against print journalism. Justice William O. Douglas, in arguing for full First Amendment rights for television and radio broadcasters (*Columbia Broadcasting System* v. *Democratic National Committee*), has usefully reminded us: "In 1970 Congressman Farbstein introduced a bill, never reported out of the Committee, which provided that any newspaper of general circulation published in a city with a population greater than 25,000, and in which fewer than two separately owned newspapers of general circulation are published, shall provide a reasonable opportunity for a balanced presentation of conflicting views on issues of public importance and giving the Federal Communications Commission power to enforce the requirement."

And Congressman Leonard Farbstein, from New York City, was generally considered a liberal!

With any encouragement from the Supreme Court, such a bill might find it a great deal easier to emerge from committee in 1974 or 1975. In this regard, it is

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important to remember that not only the Nixon Administration has been given to pressuring the press. As Richard Salant has noted, "We have learned by now that each administration improves on its predecessor in its ability to try to get at us."

Imagine John F. Kennedy's delight, or Lyndon Johnson's, if either had been able to exercise leverage on what newspapers print. Or, for that matter, the delight of Chicago's Mayor Daley or California's Governor Reagan or your own local politician-target of a critical press.

THE DAMNED FIRST AMENDMENT

I am afraid, for further illustration of the vulnerability of the First Amendment, that if a national plebiscite were held now as to whether a "fairness doctrine" similar to the one now operative against radio and television should be applied to newspapers and magazines, the results would be largely in favor of such governmental controls – the First Amendment be damned.

The grail of "fairness" is an enticing one; but unless editors are allowed to edit on the basis of their own judgment – however quirky and infuriating that judgment may be to many citizens – newspapers and magazines will be saddled with a fairness doctrine which, as William O. Douglas says of the doctrine presently imposed on television, "is agreeable to nations that have never known freedom of press and tolerable in countries that do not have a written constitution containing prohibitions as absolute as those in the First Amendment."

Even Chief Justice Warren E. Burger, who believes in the constitutionality of a fairness doctrine for television, is apparently beginning to wonder about what he and the majority of his brethren on the High Court have wrought.

"For better or worse," the Chief Justice said last year, "editing is what editors are for; and editing is selection and choice of material. That editors – newspaper or broadcast – can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values."

Ben Franklin, when he ran a newspaper, put it more bluntly. "My publication," he said, "is not a stagecoach with seats for everyone."

In any case, print journalism, despite its partial redemption in terms of public confidence as a result of Watergate, is not out of danger of government incursion into its First Amendment rights. And the broadcast media are going to have to struggle mightily to shed themselves of what I – and more importantly, to say the least, Justice Douglas – believe to be the unconstitutional Fairness Doctrine. But broadcasters are gradually getting some heretical allies. Most of the "good government" and civil liberties groups are still in favor of the Fairness Doctrine; but in 1973, the research branch of the Association of Trial Lawyers came to the conclusion that "Congress and the courts must return to the First Amendment and apply it for the benefit of all the media...Diversity of expression is not to be found in a tightly regulated medium, where fears of censorship, governmental interference, and the possibility of losing one's license reduce creativity to a common blandness, so as not to incur the wrath of the regulator."

TOWARDS DEEPER MUCKRAKING

Will television become less bland – at least in its news and documentary divisions – if it is emancipated from the Fairness Doctrine? There are no guarantees, but the strong likelihood (and I speak from many years of coverage of television journalism) is that those with a taste for muckraking – Richard Salant, Reuven Frank, Paul Altmeyer at ABC-TV, and many others – will feel a lot freer to dig a lot deeper.

I asked Richard Salant that question while researching this article. "If we had full First Amendment freedoms," he said, "the benefits to the public would be precisely the same benefits it now receives from the full application of the First Amendment to print journalism. For papers run by timid, lazy or greedy entrepreneurs, the First Amendment may not do a hell of a lot of good. So, too, in broadcasting.

"But at least," Salant added, "no timid broadcast management could cop out on the ground that they might get into Fairness Doctrine problems with the FCC, or risk a lot of lawyers' fees, or even run the danger of losing their license.

"Whether the Fairness Doctrine is a real or an imagined Sword of Damocles – and it's real enough for a lot of broadcast journalists – it also serves as a shield for some broadcasters who want to duck hard investigative reporting. I am persuaded, but obviously cannot yet prove, that the brooding omnipresence of the Fairness Doctrine *does* indeed affect the state of mind of some reporters, some editors, some news executives, if only because they know that if they don't watch out, they're going to have to spend an enormous and unfruitful amount of time and money transcribing old broadcasts and searching them out to provide material for the lawyers who have to respond to complaints and to FCC 20-day letters."

There can be no concrete proof of how much bolder and braver television journalism may become if it finally is fully protected by the First Amendment, but surely it's an option worth taking, particularly since, as Judge Bazelon emphasizes, "Most Americans now consider television and radio to be their most important news sources. Broadcast journalists have grown up. They see it as in their interest to be guided by the same professional standards of 'fairness' as the printed press. There is no factual basis for continuing to distinguish the printed word from the electronic press as the true news media."

And that analysis, I contend, is fair enough – for all. ■